Supreme Court of the United States

OCTOBER TERM, 1928.

No. 628

RICHARD L. DAVEY,
Petitioner, Plaintiff
and Appellant,

versus

DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, a Corporation, and LEHIGH VALLEY RAILROAD COMPANY, a Corporation, Jointly, Severally, or in the Alternative,
Respondents, Defendants
and Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

Delaware, Lackawanna & Western Railroad Company, a corporation, and Lehigh Valley Railroad Company, a corporation, who are the respondents to the petition for writ of certiorari now presented to this Honorable Court, and

who were the defendants and respondents in the courts below, respectfully oppose the issuance of the writ prayed for by the petitioner and contend that said petition should be dismissed by this Honorable Court, with costs to said respondents. On behalf of said respondents, we respectfully submit that the decision of the Honorable Court of Errors & Appeals of the State of New Jersey, here sought to be reviewed, upon the questions to said Honorable Court below presented, was in all respects reasonable, proper, logical and in accordance with applicable and controlling law, and is justifiable and sustainable by and under the Constitution and laws of the United States and of the State of New Jersey and the decisions of this Honorable Court and of the courts of the State of New Jersey in cases factually similar to the instant cause.

I.

The Opinion of the Court Below.

As has been correctly stated in the brief in support of the petition (P. B. 2), the opinion of the New Jersey Court of Errors & Appeals has not yet been officially reported, but is copied at length in the record (R. 7). It was rendered October 15, 1928 and is (unofficially) reported in 143 Atlantic Reporter, 313.

We submit that an accurate analysis of said opinion below justifiably leads to the inference that it is based upon the following grounds:

> (a) That the petitioner as an employee of the respondents or one of them, was a pipe fitter engaged in the repair of a vessel owned by the respondents, or one of them, upon navigable waters, and that, in

the course of his said employment, petitioner sustained injuries resulting from alleged negligent failure of his employer or employers to supply him with proper instrumentalities for his work and to use reasonable care in the inspection thereof, and that the complaint inferentially alleged that the cause arose in interstate commerce (R. 8).

(b) That the Workmen's Compensation Act of New Jersey deprived an employee of the common law remedy in a state court referred to in the third subdivision of section 371, Title 28, U. S. Code—The Judicial Code of the United States (R. 10).

(c) That the remedy under the Federal Employers' Liability Act (U. S. Code, Title 45, ch. 2, section 51) is not a common law remedy within the sense of the "saving clause" in section 371, subdivision 3 of the Judicial Code of the United States last above referred to (R. 10).

(d) That the Merchant Marine Act (U. S. Code, Title 46, ch. 18, section 688) is not applicable to the instant cause, for the reason that neither a seaman nor a stevedore is here involved (R. 9-10).

(e) That *Messel* v. *Foundation Company*, 274 U. S. 427, is distinguishable from and not controlling of the instant cause (R. 10-11).

II.

The Federal Questions Involved.

The respondents respectfully submit that the instant petition for writ of certiorari raises the following Federal questions for determination by this Honorable Court:

(a) Is the Workmen's Compensation Act of the State of New Jersey (2 Cum. Supp. Comp. St. 3868),

in depriving petitioner of a common law remedy in the courts of that state for a maritime tort, in conflict with the Constitution or laws of the United States?

(b) Is petitioner entitled to a remedy in the courts of New Jersey under any or all of the following Federal laws:

(1) Judicial Code of the United States (U. S. Code, tit. 28, sec. 371, subdivision 3)?

(2) The Federal Employers' Liability Act (U. S. Code, tit. 45, ch. 2, sec. 51)?

(3) The Merchant Marine Act (U. S. Code, tit. 46, ch. 18, sec. 688)?

III.

Summary of Argument.

1. The New Jersey Workmen's Compensation Act abrogates any and all common law remedy in the courts of that state as between servant and master for injuries sustained in and arising out of his employment.

N. J. Workmen's Compensation Act, 2 Cum. Supp. Comp. Stat. (N. J.) 3871, Section 2, par. 8 & 9—P. L. 1911, ch. 95, at p. 136;

Sexton v. *Newark District Telegraph Co.*, 84 N. J. Law 85, affd. 86 N. J. Law 701;

Bockhop v. *Phoenix Transit Co.*, 97 N. J. Law 514;

Raymond v. *Chicago, Milwaukee & St. Paul Railway Co.*, 243 U. S. 43;

New York Central Railroad Co. v. *White*, 243 U. S. 188;

Mountain Timber Company v. *Washington*, 243 U. S. 219;
Southern Pacific Co. v. *Jensen*, 244 U. S. 205.

2. The New Jersey Workmen's Compensation Act, in so abrogating common law remedy as between master and servant, is not in conflict with the Constitution or laws of the United States.

N. J. Workmen's Compensation Act, 2 Cum. Supp. Comp. Stat. (N. J.) 3868;
Sexton v. *Newark District Telegraph Co.*, 84 N. J. Law 85, affd. 86 N. J. Law 701;
Hawkins v. *Bleakly*, 243 U. S. 210;
Grant Smith-Porter Ship Company v. *Rohde*, 257 U. S. 469;
Middleton v. *Texas Power & Light Company*, 249 U. S. 152.

3. The remedies provided by the Federal Employers' Liability Act are not common law remedies within the "saving clause" of subdivision 3 of section 371 of tit. 28, U. S. Code—The Federal Judicial Code.

Federal Employers' Liability Act (U. S. Code, Title 45, ch. 2, sec. 51);
Mondou v. *New York, New Haven & Hartford Railroad Co.*, 223 U. S., p. 1;
Seaboard Air Line Railroad Co. v. *Horton*, 233 U. S. 492;
Southern Pacific Co. v. *Jensen*, 244 U. S. 205;
Knickerbocker Ice Co. v. *Stewart*, 253 U. S. 149;
Washington v. *Dawson & Co.*, 264 U. S. 219.

4. Petitioner's complaint in the New Jersey Supreme Court does not set forth a cause of action cognizable under the Federal Employers' Liability Act.

Complaint (R. 1-3);
Shanks v. *Delaware L. & W. R. Co.*, 239 U. S. 556;
Chicago, B. & Q. R. Co. v. *Harrington*, 241 U. S. 177;
Southern P. Co. v. *Industrial Acci. Com.*, 251 U. S. 259;
Industrial Acci. Co. v. *Davis*, 259 U. S. 182.

5. The New Jersey Workmen's Compensation Act could have afforded petitioner a remedy.

N. J. Workmen's Compensation Act, 2 Cum. Supp. Comp. Stat. (N. J.) 3868;
Western Fuel Co. v. *Garcia*, 257 U. S. 233;
Grant Smith-Porter Ship Company v. *Rohde*, 257 U. S. 469;
Millers' Indemnity Underwriters v. *Braud*, 270 U. S. 59;
T. Smith & Son v. *Taylor*, 276 U. S. 179.

6. If petitioner's complaint below did not allege *prima facie* a cause of action under the Federal Employers' Liability Act, and if the employment in which he was engaged at the time he was injured was not a matter of purely local concern, the regulation whereof by State enactment would occasion no interference with the uniform operation of the maritime law in its international and interstate relations, petitioner, not being a seaman within the meaning of the

Merchant Seamen's Act, could not have properly invoked the jurisdiction of the New Jersey Supreme Court.

Merchant Seamen's Act (U. S. Code, tit. 45, ch. 2, sec. 51);

International Stevedoring Co. v. *Haverty*, 272 U. S. 50;

Northern Coal & Dock Co. v. *Strand* (U. S. Supreme Court), 73 L. ed. advance, p. 99.

IV.

Argument.

The variety of questions raised by the petition for writ of certiorari now coming before this Honorable Court in this cause, invoking, as they do, the interpretation of several Federal and State laws, requires to some extent at least, the employment of an experimental method in solving the problems involved in a correct and logical interpretation of the various Federal and State decisions which have heretofore had to do with the statutory enactments which would seem to have a bearing upon the matter now before the Court. Starting, therefore, with the primary relationship disclosed by the petitioner's original complaint as obtaining between the parties, the law of master and servant would seem to invite an inspection. Viewing the law applicable to such a relationship from the State standpoint alone, as of the time of the accrual of the cause of action, if any, to petitioner, and leaving aside, for the moment, consideration of the locus of the alleged tort, we find the field of right and liability as between master and servant in the State of New Jersey, exclusively occupied by the Workmen's Compensation Act of that state. In considering

that act, it must be recognized that it provides two alternative remedies, presented under the two main subdivisions of the act itself. The first main subdivision thereof, known as Section 1, (P. L. 1911 N. J., p. 134) and in the act itself entitled, "Compensation by Action at Law", affords an employee, injured in the course of his employment, a remedy at law in the State courts, where the injury can be predicated upon negligence of the employer as its natural and proximate cause, but limits a remedy by such means by the abolition of several of the defenses which, under such an action at law prior to the adoption of the act, would have been available to the employer, thereby substituting for the common law remedy available under the circumstances formerly, a purely statutory remedy as provided in the act. Section 2 of this statutory creation (P. L. 1911 N. J., p. 136) entitled in the act itself, "Elective Compensation", provides that where the employer and employee shall expressly or impliedly agree that both parties shall be bound by the provisions of said second section of said act, compensation shall be awarded to the employee for injuries sustained arising out of and in the course of his employment, in accordance with a fixed schedule of admeasurement (P. L. 1911 N. J., p. 137) and irrespective of negligence on the part of the employer. This second section of the act, similar to cognate provisions in acts of other states adopted about the same time, creates, as it is commonly described, a remedy by commission under statutory schedule, entirely foreign to the common law remedy which would otherwise be available.

It is to be noted that the said section 2 further provides that the agreement between the employer and employee above referred to as constituting the basis for the application of the act, shall be a complete surrender by the parties

of their rights to any other method, form or amount of compensation (P. L. 1911 N. J., ch. 95, sec. II, par. 8), and that every contract of hiring made subsequent to the date of taking effect of said act, shall be deemed to have been made with reference to the provisions of section 2 of the act, unless prior to any accident there be an express contract in writing to the contrary, or a written notice from either party to the other prior to the accident, that the provisions of section 2 shall not apply (P. L. 1911, N. J., ch. 95, sec. II, par. 9, p. 136).

An analysis of the Act referred to, and here discussed, will indicate that, in any given situation where a contract of employment was entered into after the effective date of said Compensation Act and in the absence of notice between the parties pursuant to the act to the contrary, the provisions of Section 2 of the New Jersey Workmen's Compensation Act constitute the exclusive source of remedy to an injured employee against his employer in the State of New Jersey, subject, of course, to the applicability of supervening Federal law in particular situations, which are to be discussed below herein. As was natural, the constitutionality of this act was raised in the State of New Jersey, and by its courts determined favorably, the leading case with reference to the question being that of *Sexton* v. *Newark District Telegraph Co.*, 84 N. J. Law 85, affirmed 86 N. J. Law 701, the authority and conclusiveness of the decision wherein being recognized by this Court in several decisions, among which are:

Sexton v. *Newark District Telegraph Co.*, 84 N. J. Law 85, affd. 86 N. J. Law 701;

Raymond v. *Chicago, Milwaukee & St. Paul Railway Co.*, 243 U. S. 43;

New York Central Railroad Co. v. *White*, 243 U. S. 188;
Mountain Timber Company v. *Washington*, 243 U. S. 219;
Southern Pacific Co. v. *Jensen*, 244 U. S. 205;
Western Fuel Co. v. *Garcia*, 257 U. S. 233.

Advancing a step further in our analysis of the situation from an experimental standpoint, let us apply the instant facts to the New Jersey Workmen's Compensation Act, for the purpose of ascertaining, *first*, whether the provisions of the act last mentioned are broad enough to cover the facts now before the Court, as set forth in petitioner's complaint in the New Jersey Supreme Court, and *next*, whether, in the light of existing Federal law, the provisions of the New Jersey Workmen's Compensation Act could be properly extended without conflict to cover the situation in question. Petitioner's employment was that of a pipe fitter (R. 3), whether a purely marine pipe fitter or a general pipe fitter, habitually employed upon land as well as upon vessels, does not appear. His employer or employers was one or were both of two railroad corporations, the respondents herein (R. 2-3). The complaint alleges that the said respondents were engaged in interstate commerce (R. 2). That allegation immediately reminds us that Congress has prescribed a remedy, under its Constitutional power to regulate commerce, to injured employees against railroad employers, where, at the time of the injury, the employment within which the same actually arose was the mutual engagement on the part of both employer and employee in interstate commerce (U. S. Code, tit. 45, ch. 2, section 51). Both the courts of New Jersey and of the United States, and particularly this Honorable Court, have, in carefully considered opinions, interpreted the provisions of the Fed-

eral statute last referred to as requiring that it can only be invoked where both employer and employee are, in the operation out of which the injury arose, engaged in interstate commerce, and a complaint which fails to set forth such facts is demurrable.

The original judgment in this cause was obtained upon a motion to strike the complaint, which is the modern New Jersey equivalent for a general demurrer (*Savage* v. *Public Service R. Co.*, 95 N. J. Law 432; *Shaedel* v. *Liberty Trust Co.*, 99 N. J. Law 380). In making such a motion, the moving party is deemed to admit the truth, for the purpose of the motion only, of all of the allegations of the complaint, and the legal inferences justifiably to be drawn therefrom. The question suggests itself, therefore: Does the allegation contained in the complaint that the respondents were engaged in interstate commerce, coupled with the allegation that the employee was engaged in repairing a vessel standing on navigable waters off a marine repair yard, constitute the equivalent of an allegation that both the employer and employee were, at the time the injuries were sustained, engaged in interstate commerce? We respectfully submit that it does not, upon the authority of the following decisions of this Court:

Shanks v. *Delaware L. & W. R. Co.*, 239 U. S. 556;

Chicago, B. & Q. R. Co. v. *Harrington*, 241 U. S. 177;

Southern P. Co. v. *Industrial Acci. Com.*, 251 U. S. 259;

Industrial Acci. Com. v. *Davis*, 259 U. S. 182.

Referring particularly to the case last cited, we find that the Court therein was confronted with the necessity of de-

termining whether the employment involved was in interstate commerce. The employee was injured while working in the general repair shops of the railway company upon an engine that had been employed in interstate commerce, and which was destined to be so employed again. This Court, in determining that the employment was not in or inseparably a part of interstate commerce and therefore not within the purview of the Federal Employers' Liability Act, said, through Mr. Justice McKenna (at p. 187):

> "The Federal act gives redress only for injuries received in interstate commerce. But how determine the commerce? Commerce is movement, and the work and general repair shops of a railroad, and those employed in them, are accessories to that movement, —indeed, are necessary to it; but so are all attached to the railroad company,—official, clerical or mechanical. Against such a broad generalization of relation we, however, may instantly pronounce, and successively against lesser ones, until we come to the relation of the employment to the actual operation of the instrumentalities for a distinction between commerce and no commerce. In other words, we are brought to a consideraton of degrees, and the test declared, that the employee, at the time of the injury, must be engaged in interstate transportation or in work so closely related to it, as to be practically a part of it, in order to displace state jurisdiction and make applicable the Federal act. * * * But equipment out of use, withdrawn for repairs, may or may not partake of that character, according to circumstances; and among the circumstances is the time taken for repairs,—the duration of the withdrawal from use. Illustrations readily occur. There may be only a placement upon a sidetrack or in a roundhouse,—the interruption of actual use, and the return to it, being of varying lengths of time; or there may be a re-

> moval to the repair and construction shops, a definite withdrawal from service and placement in new relations,—the relations of a workshop,—its employments and employees having cause in the movements that constitute commerce, but not being immediate to it."

In the case at bar, the equipment in question was a tugboat (R. 2) and the employee, a pipefitter, was engaged in "*repairing and refitting*" said vessel (R. 3). The employment, therefore, must be determined from a reasonable interpretation of these critical words, i. e. "repairing and refitting", as applied to the "tugboat" involved. Applying the test embodied in Mr. Justice McKenna's opinion as above quoted to "repairing and refitting" a "tugboat" used in connection with a repair yard, and allowing for all reasonable inferences and deductions from the words examined, the conclusion is irresistable that the employment referred to was not in interstate commerce and the Federal Employers' Liability Act therefore, eliminates itself from applicability.

If this question is to be answered in the affirmative, however, that is to say, if the allegations of the complaint are to be deemed sufficient on their face, to state a cause of action which, without more, would be within the provisions of the Federal Employers' Liability Act, it may, we submit, with propriety then be asked, are there any other elements embraced within the allegations which in themselves are to be deemed sufficient to exclude the applicability of the act from the case?

We now refer particularly to the allegations of the complaint which allege that the employment was on shipboard, the work was that of repairing and the vessel itself was upon navigable waters of the United States. These facts,

we submit, are tantamount to the setting forth of a maritime tort (*Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52), which, without more, would create in the petitioner, an alternate remedy, either *in rem* or *in personam* in admiralty or *in personam* at common law, provided, however, there subsisted in the courts of New Jersey, under the "saving clause" of the Judiciary Act, a common law remedy available to the petitioner under the circumstances, competent to afford relief.

At this juncture, we revert to the fact that the New Jersey Workmen's Compensation Act, in abolishing the common law remedy of a servant against his master, at least where no agreement or notice had been entered into or given, precluded the application of the provisions of section 2 of the act, to the employment. This situation arose in *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, wherein this Honorable Court determined that under a maritime contract of employment, where the employee sustained injury in the course of his employment, and, in the particular state in question, a compensation law existed which supplanted the common law remedy theretofore available, the saving clause of the Judiciary Act did not apply, and nevertheless, further, decided that neither the Federal Employers' Liability Act nor the State Compensation Act in question afforded any remedy to the injured party because of the maritime nature of the employment, and locus of the tort, which created exclusive jurisdiction in the United States District Courts in admiralty.

In connection with the case last cited, the date of that decision is significant when compared with the date of the amendment shortly thereafter of the "saving clause" of the Judiciary Act referred to. The Jensen case was decided by this Court May 21, 1917. On October 6, 1917, not quite six

months after the Jensen decision, Congress amended the Judiciary Act, particularly the "saving clause", by adding to the clause as it originally stood, the words, "and to claimants for compensation for injuries to or death of persons other than the master or members of the crew of a vessel, their rights and remedies under the workmen's compensation law of any State, District, Territory or possession of the United States, which rights and remedies, when conferred by such laws, shall be exclusive." Can the reason underlying the adoption of this amendment be properly deduced as being aught else than an attempt to ameliorate conditions similar to those in which the respondent in the Jensen case found himself under the decision of this Court? We respectfully submit that any other inference would be justly chargeable with unreasonableness. Referring again, however, to the Jensen decision, we find that it was not confined to State Workmen's Compensation acts alone, but that the rule enunciated in the opinion of the Court, embraced both the Federal Employers' Liability Act and State Compensation acts within its scope and excluded the application of either from the facts underlying the case. If, therefore, Congress had in mind the Jensen case in adopting the amendment to the "saving clause" of the Judiciary Act, it must have taken cognizance of both the Federal Employers' Liability Act and State Compensation laws, and the failure of the amendment to include, as a further addition to the "saving clause", the saving of a remedy under the Federal Employers' Liability Act, would seem in all reason to have been intentional on the part of Congress, and to justify the assumption that Congress had no intention of attempting to effect by statutory enactment a change in the rule and doctrine enunciated in the Jensen case.

Shortly thereafter, however, this Honorable Court decided the case of *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, wherein it declared that the said amendment of October 6, 1917, of the saving clause of the Judiciary Act was unconstitutional, and it recognized the position taken in the Knickerbocker Ice case with approval in its decision in *Washington* v. *Dawson & Co.*, 264 U. S. 219. The amendment to the said "saving clause", having thus been declared unconstitutional, became null and void and the "saving clause" was restored to the condition and effect in which it was before the amendment was added, thus reaffirming as controlling law, the decision in *Southern Pacific Co.* v. *Jensen*.

We respectfully submit, therefore, that the jurisdiction of the New Jersey Supreme Court to entertain the petitioner's suit was sustainable neither by the "saving clause" of the Judiciary Act in the light of the effect of the New Jersey Compensation Act upon the former common law of New Jersey theretofore applicable, nor by the Federal Employers' Liability Act. We must, therefore, cast about further in the endeavor to find another Federal law, because there is no further State law pertinent to the facts under which the entertainment by the New Jersey Supreme Court of petitioner's suit might be justified. We find, therefore, a further act commonly known as the Merchant Marine Act (U. S. Code, tit. 46, ch. 18, sec. 688) whereby Congress, in the exercise of its constitutional powers to regulate commerce, and for the purpose of codifying more uniformly the maritime law applicable to those who are engaged in such commerce, and incidentally, it would seem, with the ultimate object of encouraging the building up of the United States merchant marine (*Merchant Marine Act*—U. S. Code, tit.

46, ch. 24), provided in substance that any seaman who was injured during the course of his employment might proceed at law in either a State court or a Federal District court in the district in which he sustained injuries, against his employer, to recover damages for the injuries sustained, and the act further provided that all of the provisions of the Federal Employers' Liability Act should be deemed to have been re-enacted into and to form a part of the said Merchant Marine Act, and to be applicable to causes of action within the scope of the act last mentioned. Fitting the facts in the instant case to the remedial structure of the Merchant Marine Act, let us see whether the statute is apt to afford a remedy. This would seem to narrow the question finally down to this: Was the petitioner in this cause a "seaman" within the meaning of the term as used in the Merchant Marine Act? The word "seaman" as used in said act has been presented for interpretation to this Honorable Court before, and this Court has extended the scope of the term to include individuals more generally referred to as stevedores (*International Stevedoring Co.* v. *Haverty*, 272 U. S., 50; *Northern Coal & Dock Co.* v. *Strand* (U. S. Supreme Ct.), 73 L. ed. adv., p. 99). In the most recent decision of this Court which has come to our attention on the subject, that of *Northern Coal & Dock Co. et als.* v. *Strand*, decided December 10, 1928, and thus far reported in 73 L. ed. (adv., p. 99), this Court, following and approving *International Stevedoring Co.* v. *Haverty* (*supra*), declared that, within the intendment of the Merchant Marine Act, "seaman" is to be taken to include stevedores employed in maritime work on navigable waters. We respectfully submit that despite the rather broad extension of interpretation effected by the decisions in the last two cited cases, the petitioner

in the instant case could not, without violence to the English language, be deemed to be a seaman within the intendment of the Merchant Marine Act. We are confined to the complaint as the sole source of ascertaining who and what the petitioner was. He is therein described as a pipefitter (Complaint, R. 3), and we have heretofore adverted to the fact that it does not appear whether he was a purely marine pipefitter or a pipefitter of the general type, analogous in many ways to a plumber. He was pursuing his employment in repairing the vessel named in the complaint. Whether the vessel was actually under way while he was making the repairs, does not appear, but the inference would seem to be justifiable that it was either riding at anchor or moored to a dock. It was a tugboat, not an ocean-going vessel nor a vessel of the type or size which would justify the inclusion, in its regular complement of crew, of a pipefitter. The vessel belonged at, and apparently was used in connection with a marine repair yard operated by the respondents or one of them (Complaint, R. 2). The assumption seems justifiable that this pipefitter was one of several workers ordinarily operating in and in connection with the marine repair yard, that is, upon land, and that he had further been sent aboard the vessel from the shops for the purpose of making the repairs in question. If we adopt the conclusion that the petitioner in this cause was *not* a seaman within the intendment of the Merchant Marine Act, it may be properly asked, in what forum and under what law would a remedy have been available to him? Despite the decisions of the New Jersey courts, particularly *Coon* v. *Kennedy*, 91 N. J. Law 100, affirmed, 91 N. J. Law 598; *O'Brien* v. *Scandinavian-American Line*, 94 N. J. Law 244; *Bockhop* v. *Phoenix Transit Co.*, 97 N. J. Law 514, and *March* v.

Vulcan Iron Works, 102 N. J. Law 337, to the effect that where the locus of the injury was on navigable waters, the State Compensation Act was inapplicable and admiralty jurisdiction was exclusive, we can discover no word in the Workmen's Compensation Act itself which confines the operation of the act to land employments or non-maritime injuries. It is perfectly evident from a study of the New Jersey decisions last cited that the ground upon which the compensation act was held to be inoperative in cases of maritime injury was the assumption of the supremacy of the Federal law with reference to matters maritime. We recognize the rule, to be gleaned from many of the decisions of this Court, that, if there remains under the State law a common law remedy, an injured suitor, in cases of maritime tort, in proceeding in *personam*, may elect as between the Federal courts in admiralty and the State courts at common law in seeking his remedy. If, therefore, our contention is sound that the New Jersey Workmen's Compensation Act abolished a common law remedy in the State Court within the intendment of the "saving clause" in question, then, the New Jersey decisions last referred to are sound as to the exclusiveness of the Federal jurisdiction. If, however, our said conclusion is not sustainable, then the State Compensation Act left a residuum of common law remedy available which could be invoked by the petitioner in this cause. If, on the other hand, it is to be justifiably inferred from the allegations of the complaint that a cause of action within the Federal Employers' Liability Act was thereby stated, then the "saving clause" would not apply, but the petitioner could, nevertheless, seek relief in the State forum under the authority of the Federal act. If, however, further, the complaint is *not* to be deemed to have set forth a cause

of action cognizable under the Federal Employers' Liability Act, then the petitioner must seek further for a remedy under the Merchant Marine Act, with reference to which, if he is not to be considered a "seaman" within the intendment of that act, the provisions of the same cannot by him be properly invoked. His remedy, therefore, remains necessarily confined to the original admiralty jurisdiction of the United States District Court in proceedings either *in rem* against the vessel or *in personam* against his employer (U. S. Code, tit. 28, sec. 371, subdiv. 3).

The respondents, therefore, most respectfully submit to this Honorable Court that, for the reasons hereinabove set forth, the petition for writ of certiorari herein should be dismissed with costs to the respondents.

Respectfully submitted,

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